Supreme Court, U.S.
FILED
DEC 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-869 (3)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

HENRY HOLT AND COMPANY, INC.,

*Petitioner*,

—against—

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,

*Respondent*.

## BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Association of American Publishers, Inc. ("AAP") respectfully submits this brief, *amicus curiae*, pursuant to Rule 36 of the Rules of this Court, in support of the petition of Henry Holt and Company, Inc. ("Holt") for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit in this action.[1]

### INTEREST OF THE *AMICUS CURIAE*

AAP is the major trade association of book publishers in the United States. Its more than 200 members include most of the leading commercial book publishers in the United States, as well as many smaller and non-profit publishers, university

1 Copies of both parties' consents to the filing of the brief are submitted herewith.

presses and scholarly associations. AAP's members together account for 75 percent of the dollar volume of books published in this country.

The works of AAP's members enrich our storehouse of knowledge and serve well the publishing industry's assigned tasks of preserving our cultural heritage, educating and informing the populace, and offering thoughtful, if often provocative and critical, insights into the political, social, religious and other cross-currents that help shape and enrich our lives. Especially significant in fulfilling these objectives are biographies of public figures, historical treatises, and other forms of scholarly commentary and criticism focusing on important events and personages. To be lucid and penetrating, analytical and thorough, works of this genre call upon the widest possible range of source materials. They do not, nor could they credibly, draw the line at analyzing the "public" record, as reflected solely in published materials; at least as important is the "non-public" record, as revealed in unpublished (but often, as here, publicly disseminated) primary source materials such as a biographee's speeches, correspondence and diaries.

The reasoning of the Court of Appeals in this case threatens profoundly negative consequences for the vitality of works of biography and history so dependent upon resort to such unpublished materials. The Second Circuit, which embraces the capital of the nation's book publishing operations, has enunciated two virtual *per se* rules which are at odds with basic copyright and First Amendment precepts and this Court's controlling precedents. The first rule is that no biographer or historian (or anyone else) can quote or closely paraphrase—however selectively and limitedly, and regardless of purpose—any technically unpublished material unless the creator of that material (or the estate or others to whom the rights have passed) has granted permission. *Per se*, according to the Court of Appeals, there cannot be any fair use of such material. The Court of Appeals' second virtual *per se* rule is that the inevitable remedy for utilizing "more than minimal amounts" of such unpublished material is an injunction against publication of the work.

This one-two punch landed by the Second Circuit on historical and scholarly publishing is a knockout blow. In the wake of the decision below, no prudent publisher can afford to risk even very limited quotation from unpublished materials—no matter the degree of their prior dissemination or how compelling the purpose—since to do so invites injunction of the entire work. The Second Circuit's flat pronouncement as to the unavailability of fair use for unpublished materials is unpalatable in and of itself; coupled with the sanction publishers have now been advised to expect, the decision's likely effects are indeed Draconian and stifling.

The AAP and its publisher members have a direct and compelling interest in the protection against appropriation of their literary property guaranteed by § 106 of The Copyright Revision Act of 1976 (hereinafter the "1976 Copyright Act"). At the same time, they have a vital interest in their ability and duty fully to inform the public through the publication of serious and scholarly historical and biographical works, which almost invariably must draw upon copyrighted published and unpublished sources. The "difficult balance" between authors' interests in controlling their writings and "society's competing interest in the free flow of ideas, information, and commerce," *Sony Corp.* v. *Universal City Studios*, 464 U.S. 417, 429 (1984), has been accommodated by the copyright law's fair use doctrine, now codified in § 107 of the 1976 Copyright Act.

Both the framers of the copyright law and this Court have recognized that the fair use doctrine calls for an equitable balancing of the interests of creators and the public at large, and is subject to case-by-case application. Most recently, in *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539 (1985), this Court dealt directly with the subject of fair use in the context of unpublished works. It there placed a substantial, but not insuperable, burden on one seeking to utilize unpublished (and there undisseminated) materials, in deference to authors' rights of first publication. The Court in *Harper & Row* anticipated situations, not presented on the facts there involved, where resort to unpublished material *can* qualify as a fair use—for instance where the materials, although technically unpublished, have

been disseminated or where quotation may be "necessary adequately to convey the facts." *Id.* at 563.

Regrettably, the Second Circuit has left no room for the mandated case-by-case determination. In disregard of *Harper & Row* and congressional intent, it has effectively prescribed that the single dispositive factor in the fair use calculus when dealing with unpublished materials is their unpublished nature. Their use, however limited, for whatever purpose, with whatever impact on the market for the original, and regardless of the extent of their prior dissemination, is strictly forbidden if without permission. This conclusion has been given further astonishing weight by the injunction remedy said by the Second Circuit to follow as a matter of course from violation.

The Court of Appeals' mode of analysis is plainly at odds with the copyright law, the policies of the First Amendment and all governing precedent. AAP's belief that it will have enormous detrimental consequences to the publishing process and to the carefully fashioned balance between creators' rights in their unpublished works and the public's interest in and need for access to information and knowledge, leads it to submit this brief, *amicus curiae*, urging reversal of the decision below.

## STATEMENT OF THE CASE

This lawsuit is part of a continuing effort by the Church of Scientology to limit unauthorized commentary about its now deceased founder, L. Ron Hubbard. Specifically, the suit seeks to enjoin publication of a biography critical of Hubbard on grounds that the biographer has infringed copyrights of Hubbard contained in various of his unpublished works.[2]

In 1987, New Era Publications, a corporation related to the Church of Scientology and founded to hold Hubbard's copyrights, sued to enjoin Henry Holt and Company from publish-

2 The opinions below are reported at 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir.), *reh'g denied*, 884 F.2d 659 (2d Cir. 1989).

ing *Bare-Faced Messiah* ("*Messiah*"), a biography of Hubbard by Russell Miller. This litigation effort in fact followed previous efforts by New Era (all unsuccessful) to enjoin publication of the work in three other countries, and, indeed, was brought as a copyright action only after previous assertions that publication would be defamatory failed to deter publication. *See* 695 F.Supp. 1493, 1527-28 n.14.

*Messiah*, which is sharply critical of Hubbard and his teachings, relies in part on a number of Hubbard's published and unpublished works. Although its suit embraced *Messiah*'s unauthorized use of published as well as unpublished works, New Era focused its attack, and the opinions below their analysis, upon the book's use of Hubbard's unpublished writings. Among the unpublished works drawn upon were Hubbard's letters to the government, a benefits application to the Veteran's Administration, personal letters, and diaries. Many of the documents were obtained by Miller from United States government agencies by means of Freedom of Information Act requests.

The excerpts quoted from unpublished works were found by the District Court, per Judge Pierre Leval, to have been utilized almost exclusively to demonstrate particular character traits and flaws possessed by Hubbard—such as dishonesty, paranoia, and boastfulness—at odds with the self-image carefully projected by Hubbard to the public. *Id.* at 1508. The District Court further concluded that Miller's use of selected passages was neither gratuitous nor designed merely to display Hubbard's style of writing but, rather, as to the vast majority, "reasonably require[d] . . . to demonstrate the validity of an important critical point." *Id.* at 1523.

As against New Era's position that the unpublished nature of the works virtually conclusively precluded a fair use finding, Judge Leval determined that the overwhelming percentage of the challenged uses were indeed fair uses under § 107 of the 1976 Copyright Act. The court observed that "[t]heir value for the biography lies precisely in the subject's choice of words—not as a matter of literary expression—but for what the choice of words reveals about the subject." *Id.* at 1524. Plainly, the

court realized, without such freedom of quotation, "the biographer's point . . . cannot be made." *Id.* at 1507. Further in support of its fair use determination, the District Court concluded, analyzing the critical fourth factor to be weighed under § 107—the effect of the taking on the market for Hubbard's writings—that because the takings constituted only "small fragments of the aggregate" of the works drawn from, and would not satisfy the appetite of those interested in Hubbard's writings, *id.* at 1523, no adverse market effect had been demonstrated.

Nevertheless feeling somewhat constrained by the Second Circuit's earlier decision in *Salinger* v. *Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987),[3] the District Court reluctantly found that a "small but more than negligible" body of unpublished material utilized by Holt did not pass the fair use test. 695 F. Supp. at 1524. As to these minor infringements, Judge Leval denied New Era injunctive relief as against further distribution of the work, both because of New Era's extreme delay in bringing suit, and because of the countervailing public interest in the creation and dissemination of scholarly works and related First Amendment considerations. In the District Court's view, a damages remedy for the minor infringements involved was, under the circumstances, more than adequate.

On appeal, the Second Circuit, in a majority opinion written by Judge Roger Miner, affirmed the holding of infringement, but grounded its reasoning on a far broader and more troublesome base. Evincing no interest in the purpose for which the quotations were used, and conclusorily, without citation to any

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3 In *Salinger*, the Second Circuit rejected a fair use defense to a biographer's incorporation of excerpts from personal letters penned by the reclusive author, J. D. Salinger. While the court there gave great deference to the technically unpublished nature of the letters (albeit most, if not all, were available for review at university libraries), a number of factors, including, in the view of some, Salinger's privacy interest, *see New Era*, 873 F.2d at 585 (Oakes, C.J., concurring), arguably led the Second Circuit to its decision there. With its decision here, however, the Second Circuit has elevated *Salinger*'s deference to the unpublished nature of a work to a virtually absolute bar to fair use.

record evidence, noting its disagreement with the District Court's conclusion concerning the likely effect of the uses on the market for Hubbard's writing (finding instead that "some impairment . . . seems likely"), the majority enunciated a virtually *per se* rule that any use of unpublished materials without permission constitutes infringement. Observing that "unpublished works normally enjoy complete protection," 873 F.2d 576, 583, the Court of Appeals gave utterly no indication of *any* circumstances in which there could be fair use of such material.

And, while the Court of Appeals majority concurred in denial of an injunction, it did so solely on the basis of New Era's delay in having brought suit. It made clear its position that, absent such circumstance, the copying of " 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use." *Id.* at 584.

In his concurrence, Judge James Oakes, reciting this Court's *Harper & Row* case precedent along with other authority, sharply criticized the majority's invocation of a virtual *per se* rule against fair use of unpublished works, as well as its view that an injunction should automatically issue in such cases. 873 F.2d 576, 585 (Oakes, C.J., concurring).

Holt's application for a rehearing *en banc* was denied by a 7 to 5 vote. Judge Jon Newman, dissenting from the denial, expressed concern that the panel's opinion dangerously extends *Salinger* and "risks deterring [authors and publishers] from entirely lawful writings in the fields of scholarly research, biography, and journalism." 884 F.2d 659, 662 (Newman, J., dissenting). Judge Miner, concurring in the denial, asserted that "the panel majority opinion is consistent with settled law and leaves no room for misunderstanding." 884 F.2d at 660 (Miner, J., concurring). These disparate opinions merely underscore the turbulence that has been generated by the Second Circuit's decision, and why clarification by this Court as to the issues presented is imperative.

## REASONS FOR GRANTING THE WRIT

### I.

### THE SECOND CIRCUIT'S *PER SE* RULE AS TO USE OF UNPUBLISHED MATERIALS RADICALLY UPSETS THE CAREFULLY CRAFTED BALANCE BETWEEN THE EXCLUSIVE RIGHTS AFFORDED COPYRIGHT HOLDERS AND THE LIMITATIONS PLACED ON THOSE RIGHTS BY THE FAIR USE DOCTRINE

Our nation's scheme of copyright protection, deriving from Article I, Section 8 of the United States Constitution, and from a succession of copyright law enactments, most recently the 1976 Copyright Act, is designed to encourage creativity by offering limited protection to literary and artistic expression, thereby assuring "contributors to the store of knowledge a fair return for their labors." *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 546 (1985). *Accord Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975).

At the same time, however, as this Court has observed, the privileges granted by copyright "are neither unlimited nor primarily designed to provide a special private benefit." *Sony Corp.* v. *Universal City Studios*, 464 U.S. 417, 429 (1984). Rather, the public interest in access to information and knowledge must be properly accommodated. *Id.*

A delicate balance must, therefore, be struck between protecting the works of copyright owners and permitting later artists and authors to build upon these works. Both interests are fundamental to the purpose of copyright. It was to accommodate and, as necessary, reconcile, these competing interests that the fair use doctrine developed, first at common law and, more recently, as codified in § 107 of the 1976 Copyright Act.

The fair use doctrine has been described as an "equitable rule of reason," H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) 65, *reprinted in* 1976 U.S. Code Cong. & Admin. News, 5659, 5679 (hereinafter "House Report"), whose purpose is to

advance "criticism, comment, news reporting, teaching, . . . scholarship [and] research." 17 U.S.C. § 107.[4] Its application is case and fact-specific and "calls for a sensitive balancing of interests." *Sony*, 464 U.S. at 455 n.40.

Section 107 of the 1976 Copyright Act provides general guidance to the public and the courts, in setting forth four, non-exclusive factors to be considered "[i]n determining whether the use made of a work in any particular case is a fair use."[5] It is well established that, just as these factors are non-exclusive, no one of them is definitive or determinative. *See* House Report at 65.

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4 The rationale for fair use was cogently articulated by the Second Circuit over twenty years ago:

> The fundamental justification for the [fair use] privilege lies in the constitutional purpose granting copyright protection in the first instance, to wit, "To Promote the Progress of Science and the useful Arts . . . ." To serve that purpose, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest . . . to the greater public interest in the development of art, science and industry."

*Rosemont Enters., Inc.* v. *Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (quoting *Berlin* v. *E.C. Publications Inc.*, 329 F.2d 541, 544 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964)).

5 17 U.S.C. § 107 provides:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

According to the legislative history, this statutory codification was intended "to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way." H.R. Rep. No. 1476, 94th Cong., 2d Sess., 66, *reprinted in* 1976 U.S. Code Cong. & Admin. News, 5659, 5680 (hereinafter "House Report").

This Court, in *Harper & Row*, had occasion to examine the applicability of the fair use doctrine in relation to unpublished works. While it there rejected The Nation's overly expansive fair use claim as to its unauthorized first publication of excerpts from President Ford's memoirs, this Court's conclusion followed only after careful evaluation of all four of § 107's factors, and of the policy and equitable issues there presented.

Specifically with respect to the unpublished nature of the work involved in *Harper & Row*, the Court observed that "the scope of fair use is narrower with respect to unpublished works," 471 U.S. at 564,[6] and that the unpublished nature of a work is a " 'key, though not necessarily determinative, factor' " in fair use analysis. *Id.* at 554 (quoting S. Rep. No. 473, 94th Cong., 1st Sess. (1975) 64).

Although *Harper & Row* thus enunciated a predisposition against the availability of fair use in relation to unpublished works, it certainly did not foreclose altogether application of the doctrine where particular circumstances warrant. Indeed, it was only upon the Court's examination of *all* of the fair use factors—including, but not limited to, the unpublished nature of the work—that it reached its conclusion that The Nation had infringed Harper & Row's copyright.[7]

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6 Even in the context of analyzing the second factor, the Court recognized gradations within the category of unpublished works. Ford's *A Time to Heal* was thus characterized as "an unpublished historical narrative or autobiography." *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 563 (1985). The Court explained that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy." *Id.*

7 A number of facts which dictated against a finding of fair use in *Harper & Row* are not present in *New Era*. First, unlike the Ford memoirs in *Harper & Row*, which had never been disseminated, many of the writings at issue in *New Era*, though technically "unpublished," had been furnished to the government and other third parties. Second, although, in *Harper & Row*, The Nation "scooped" Time Magazine by publishing excerpts of the Ford memoirs just prior to the date set for Time's licensed publication, and therefore triggered Time's cancellation of its contract with Harper & Row, no such detrimental market

The Second Circuit's fair use analysis in this case misreads *Harper & Row* to suggest the virtual unavailability of fair use in conjunction with any manner of use of unpublished materials. Apart from such misreading, this analytic process would elevate but one of the fair use factors enumerated in § 107—the second—to dispositive status and ignore all of the other factors that must inform a court's fair use analysis.[8] Such an approach flies in the face of the statute, its legislative history and the precedents of this Court, which nowhere exempt fair use determinations as to unpublished materials from case-by-case analysis based on the panoply of relevant factors.[9]

As importantly, the Second Circuit's *per se* view concerning use of unpublished materials ignores the public interest in the creation of works of history and biography. Such works serve fundamental First Amendment and public interests which must not be disregarded. Indeed, such works of scholarship are the very sorts of writings to which the fair use doctrine was intended to apply. *See Rosemont Enters., Inc.* v. *Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (adverting, in the fair use context, to the "public benefit in encouraging the development of historical and biographical works and their public distribution").

To deprive biographers and other historians of the ability to utilize unpublished primary source materials in appropriately

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impact is presented in *New Era*, in circumstances where Hubbard is deceased and there exist no imminent plans to publish his writings. Further relevant in *Harper & Row* was the fact that The Nation had taken "essentially the heart of the book," 471 U.S. at 565, adding little or no independent creation of its own, in contrast to the "small fragments" taken here by a biographer with a distinctive point of view.

8 Even in focusing on the second factor, the Court of Appeals ignored the factual nature of the work involved. *See supra* note 6.

9 Indeed, it is impossible to square the *per se* approach of the Second Circuit with at least one illustration of fair use as set forth in the House Report accompanying passage of the 1976 Copyright Act, to wit: "quotation of . . . short passages in a scholarly or technical work, for illustration or clarification of the author's observations." House Report at 65.

limited fashion would be to deprive them of the basic tools of their trade. Indeed, one of the earliest fair use decisions recognized that letters, for example, serve a time-honored special function as primary source material for biographers. *Folsom* v. *Marsh*, 9 F. Cas. 342, 344-45 (C.C. Mass. 1841); *see also Estate of Hemingway* v. *Random House, Inc.*, 49 Misc. 2d 726, 268 N.Y.S.2d 531 (Sup. Ct. 1966), *aff'd*, 25 App. Div. 2d 719, 269 N.Y.S.2d 366 (1966). As the noted historian Barbara Tuchman has observed, it is the historian's objective to use materials *only* from primary sources: "The most primary source of all is unpublished material: private letters and diaries or the reports, orders, and messages in government archives. There is an immediacy and intimacy about them that reveals character and makes circumstances come alive." *Practicing History*, 18-19 (1981).

The Second Circuit's extreme position thus threatens the vitality—indeed, the very creation—of many important works. The Second Circuit encompasses the heart of the book publishing industry, with many of AAP's members headquartered within its boundaries. The impact of its ruling will, therefore, both be broad and, if left undisturbed, likely influence the copyright jurisprudence of other courts of appeals which look to the Second Circuit for especial guidance in this area.

With the Second Circuit's *per se* rationale in place, publishers are faced with the unpalatable choice of either (1) refraining from publishing any work which contains more than a "minimal amount" of quotation from others' unpublished materials, thereby stifling scholarly publishing and all but guaranteeing that biographical work will be dry and sterile; or (2) publishing such work and facing the all but certain peril of a costly infringement suit in which the publisher would have little or no probability of a successful defense, and in which an injunction would almost certainly be granted—a loss that few publishers could afford.[10]

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10 Indeed, we have already seen the start of such litigation. The widow of novelist Richard Wright has commenced an action against the publisher of a biography of her husband, challenging brief quotation of

By these consequences, the Second Circuit has worked a disservice to core First Amendment policies, as well as to the policies encouraging the advancement of the sciences and arts, which are a foundation of the 1976 Copyright Act. If allowed to stand, the decision below will inevitably chill, as it already has begun to, the publication of works of authorship and consequently adversely affect the reading and learning public. The resulting censorship is anathema to the public interest in access to scholarly, informative works and to the First Amendment concerns which the Copyright Act, through its fair use provisions, strives to accommodate.

## II.

## THE SECOND CIRCUIT'S FIAT THAT INJUNCTION IS THE AUTOMATIC CONSEQUENCE OF THE USE OF UNPUBLISHED MATERIALS VIOLATES LAW APPLICABLE TO THE GRANTING OF INJUNCTIONS, IGNORES FIRST AMENDMENT VALUES AND THE PUBLIC INTEREST, AND JEOPARDIZES THE PREPARATION AND PUBLICATION OF SCHOLARLY WORK

The Second Circuit's decision not only precludes any finding of fair use of unpublished material, but virtually automatically requires an injunction against publication of the infringing work. "[T]he copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use." 873 F.2d at 584. *Accord Salinger* v. *Random House, Inc.*, 811 F.2d at 96. This automatic remedy flies in the face of settled law. Moreover, it will, and indeed already has begun to, have an immediate chilling effect on publication of historical and biographical scholarship, with far-reaching and disastrous consequences for publishers, scholars and the public interest in the continued growth of recorded knowledge.

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unpublished letters from her husband to the author of the biography. *Wright* v. *Warner Books, Inc.*, 89 Civ. 3075 (S.D.N.Y.).

Consistent with the rule that injunction " 'is not a remedy that issues as of course' " *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982) (quoting *Harrisonville* v. *W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933)), injunction is a *permissive*, not obligatory, copyright infringement remedy under § 502(a) of the 1976 Copyright Act. The discretionary language of § 502(a) is also consistent with black letter law that courts must balance the equities between the parties and weigh the public interest before granting injunctive relief. *Yakus* v. *United States*, 321 U.S. 414, 440 (1944). "Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling." *Harrisonville*, 289 U.S. at 338.

There can be no doubt that the public has a strong interest in development of and access to scholarly works. The Second Circuit has earlier observed that First Amendment values necessarily weigh heavily in determining whether a prior restraint should issue, thereby totally suppressing such scholarly works:

> "The normal reluctance to impose a summary restraint . . . is particularly acute in a case such as this which deals with the publication of a book. Before the court will intrude into an area fraught with sensitivity in its possible impingement upon fundamental democratic and intellectual institutions, it will require a showing . . . of a right, both legal and factual, in most unequivocal terms."

*Rosemont Enters., Inc.* v. *Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (quoting *Estate of Hemingway* v. *Random House, Inc.*, 49 Misc. 2d at 728, 268 N.Y.S.2d at 534 (Sup. Ct. 1966), *aff'd*, 25 App. Div.2d 719, 269 N.Y.S.2d 366 (1966)).[11]

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11 The holding of a New York State Court in denying an application for a preliminary injunction of the publication of a biography of Ernest Hemingway is particularly apposite: "We are dealing here with a possible limitation upon 'speech,' an area pregnant with social and historical implications striking at the very fundamentals of our political structure. The free and unfettered exchange of ideas and information of all types has been a hallowed tradition that has served to nourish an informed and alert citizenry." *Estate of Hemingway* v. *Random House, Inc.*, 49 Misc. 2d 726, 730, 268 N.Y.S.2d 531, 536 (Sup. Ct. 1966), *aff'd.*, 25 App. Div.2d 719, 269 N.Y.S.2d 366 (1966).

The arbitrary requirement that an injunction follows any but the most minimal use of unpublished copyrighted material cannot be reconciled with the language of the copyright law itself or overriding public interest and First Amendment considerations. Automatic invocation of injunctive relief is especially improper when other available remedies, *e.g.*, damages, will more appropriately balance the competing interests at stake. In a case such as here presented, a court must consider the remedy that is sufficient to compensate the copyright holder for any infringing use, but which at the same time does not unduly hamper the scholar's freedom to write, the publisher's right to publish, and the public's interest in access to, a work which may have narrowly crossed the line by incorporating small amounts of copyrighted, unpublished source materials.[12] *See generally Sony*, 464 U.S. 417, 499-500 (Blackmun, J., dissenting); 3 M. Nimmer, *Nimmer on Copyright*, § 14.06[B], 14-56.2 (1989) ("Where great public injury would be worked by an injunction, the courts might . . . award damages or a continuing royalty instead of an injunction . . . . ").[13]

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12 Automatic resort to injunctive relief seems especially inappropriate on facts such as here presented, where the injunction is sought by a copyright owner who is not the author and who seeks to control the dissemination of a work which paints an unflattering but demonstrably truthful portrait of the deceased author, who is a controversial public figure. The use of the copyright monopoly to stifle speech and prevent the public from learning truthful information about an individual in whom the public has a legitimate interest should not merit an automatic injunction. "It is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest." *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488, 492 (1942).

13 *See also Abend* v. *MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988), *cert. granted*, 110 S. Ct. 47 (1989) (holding that an injunction against further exploitation of an infringing motion picture would work injustice to others and that the copyright owner's proper relief was damages and an apportionment of profits); Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983, 1030 (1970):

(*footnote continued*)

This Court "has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger*, 456 U.S. at 312. Here, the District Court, weighing all of the equities, found that there was an adequate legal remedy. The Second Circuit has effectively pronounced that the sensitivity called for by the 1976 Copyright Act and prior case law, and applied by the District Court, is misplaced. Its preempting rule—that injunction must inevitably follow virtually any use of unpublished source material—will, if left uncorrected by this Court, produce incalculable damage to scholarly writing and publishing. This Court promptly should correct the Court of Appeals' error so as to permit important publishing projects to come to fruition and flourish.

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The preference for damages over injunctive relief is a corollary of the requirement of demonstrable injury. From a First Amendment viewpoint, the effect of an injunction is to restrain the infringing expression altogether—an effect which goes beyond what is necessary to secure the copyright property. An award of monetary damages, which permits the infringing expression at a reasonable cost, is more tolerable from a first amendment point of view.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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